Supreme Court, U.S.
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No. 93-882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT G. TILTON,

Petitioner,

v.

GARY L. RICHARDSON, OLE ANTHONY, HARRY GUETZLAFF, C. TONY WRIGHT, DAVID BURROWS, AND GEORGE A. OTSTOTT,

Respondents.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION OF RESPONDENTS

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ARGUMENT

A. Respondents' attack on Appellant's inherent rights argument is inconsistent with this Courts prior holding in *Carpenters v. Scott*.

Respondents, in their Brief in Opposition, flippantly assert that Pastor Tilton has, by stating that freedom of religion and association do not have as their genesis the First Amendment, advanced a "novel argument" to "circumvent" the holdings of ***Griffin v. Breckenridge***, 403 U.S. 88 (1971), ***United Brotherhood of Carpenters and Joiners v. Scott***, 463 U.S. 825 (1983), and ***Bray v. Alexandria Women's Health Clinic,*** 113 S.Ct. 753 (1993) . Respondents rely on Justice White's opinion in ***Scott***, in which they claim he dictates that "rights protected against by § 1985(3) must come from other enumerated sources, and those sources were state, Federal Constitutional or federal statutory law." (Br. in Opp. p.15) In other words, ***Scott***, under the reasoning of Respondents, holds that for a right to be protected by § 1985(3) it must be codified in some manner in only those sources. Justice White made no such statement. State law, federal statutory law, and the Federal Constitution were listed in ***Scott*** as "possibilities" for the origination of rights protected by § 1985(3), after Justice White determined that the First Amendment claim in that case failed for lack of state involvement. ***Scott*** does not hold that these are the only alternatives for finding the origin of rights, privileges or immunities. Section 1985(3) was designed to protect "any right or privilege of a citizen of the United States." There is no requirement in the statute that those rights be categorically

listed anywhere, just that they exist.

Section 1985(3) is a vehicle for the protection of inherent, natural rights. These rights exist, they existed before and independent of the First Amendment, which was adopted to protect those existing rights. Pastor Tilton does not advance this argument to "circumvent" the holdings of ***Griffin***, ***Scott*** and ***Bray***. This argument is advanced to attack the misconception those cases support, namely, that religious freedom has as its source the First Amendment, and therefore § 1985(3) cannot be applied to wholly private conspiracies that violate such a right.

B. Appellant's position regarding inherent, natural rights is consistent with current Federal law.

In support of the concept of inherent rights, and in response to Respondents' contention that Pastor Tilton has advanced such a "novel argument", Appellant would point out for the benefit of the Court the language of Title 42 U.S.C. § 2000bb, enacted on November 16, 1993, which states:

Section 1. Short Title

This Act may be cited as the "Religious Freedom Restoration Act of 1993,

Section 2. Congressional Findings and Declaration of Purposes.

(a) Findings.--The Congress finds that--

(1) *the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its*

protection in the First Amendment to the Constitution... (emphasis added)

If the First Amendment was the source of the rights which it protects, then it would follow that if § 1985(3) is to be used to vindicate any of those listed rights, the state must be shown to be the violator. The holdings of ***Griffin***, ***Scott*** and ***Bray*** would then be appropriate. The First Amendment can protect only against official conduct by its own language. The problem with this line of reasoning is that those rights listed by the First Amendment were not created by that Amendment. The language of Congress as demonstrated in 42 U.S.C. § 2000bb makes this fact all the more apparent. One cannot *"secure"* a right that does not already exist. The First Amendment was created to protect *"unalienable"* rights, rights that American citizens possess by virtue of their citizenship, from their new government that had the power to take those rights away. As Appellant asserted in his Petition for Writ of Certiorari, § 1985(3) is not an enforcement provision of the First Amendment, it is a *supplement* to the First Amendment. Section 1985(3) was created in the years of Reconstruction, when Congress recognized that the state was not the only entity that could take away a citizens "unalienable rights", but that private persons could conspire and violate those rights just as easily. The right Appellant claims to have been infringed does not have as its source the First Amendment. It is an unalienable right that is secured by the First Amendment, and secured by § 1985(3) as well.

CONCLUSION

Appellant, Robert Tilton, prays that the Court grant Certiorari to finally determine that the basic, unalienable, natural rights enumerated in the First Amendment, do not have as their source that Amendment, and that if this can be

found to be true, that Appellant has indeed asserted a right that can and must be, by virtue of § 1985(3), protected against purely private infringement.

Respectfully Submitted,

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APPENDIX

PL 103-141 (HR 1308)
November 16, 1993
RELIGIOUS FREEDOM RESTORATION ACT OF 1993

An Act to protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

«42 USCA § 200066 NOTE»

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

«42 USCA § 200066»

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS -- The Congress finds that

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution.;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in ***Employment Division v. Smith***, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES -- The purposes of this Act are

(1) to restore the compelling interest test as set forth in ***Sherbert v. Verner,*** 374 U.S. 398 (1963) and ***Wisconsin v. Yoder***, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

«42 USCA § 200066-1»

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL -- Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION -- Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person -- *1469

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF -- A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim for defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

SECTION 4. ATTORNEYS FEES.

«42 USCA § 1988»

(a) JUDICIAL PROCEEDINGS -- Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

«5 USCA § 504»

(b) ADMINISTRATIVE PROCEEDINGS -- Section 504(b)(1)(C) of Title 5, United States Code, is amended --

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

«42 USCA § 200066-2»

SECTION 5. DEFINITIONS.

As used in this Act --

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

«42 USCA § 200066-3»

SECTION 6. APPLICABILITY.

(a) IN GENERAL -- This act applies to all federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION -- Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED -- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

«42 USCA § 200066-4»

SECTION 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this *1490 Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits or exemptions.

Approved November 16, 1993.